STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARWIN EUGENE MOORE,

Defendant-Appellant.

UNPUBLISHED
June 6, 2013

No. 309651
Wayne Circuit Court
LC No. 11-009266-FC

Before: CAVANAGH, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of six counts of first-degree criminal sexual conduct, MCL 750.520b, and one count of second-degree criminal sexual conduct, MCL 750.520c.[1] Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to concurrent sentences of 47 years and 6 months to 85 years for each count. We affirm defendant's convictions but remand for resentencing.

I. FACTUAL BACKGROUND

Defendant began sexually assaulting the victim, his biological daughter, when she was approximately two years old. She first remembered sexual contact when she was bathing, and defendant inserted his fingers in her genital region. She also recalled a time when she was younger than 13 years old when defendant took her into a dark room and made her perform oral sex on him, which included forcing her to bite his penis. She testified that this occurred several times before she was 13 years old. Defendant also engaged in other sexual contact, which included touching her buttocks. All of this activity occurred in Wayne County.

The victim also testified that defendant would transport her to where he worked or lived in order to perform oral sex on her and force her to perform oral sex on him. The victim testified that defendant would rub his penis in her vaginal opening, penetrating only through the lips.

[1] Although the judgment of sentence provides that defendant was convicted of seven counts of first-degree criminal sexual conduct, one of those counts was for second-degree criminal sexual conduct. As discussed *infra*, because resentencing is required, defendant's judgment of sentence should be corrected on remand.

When asked where some of these events occurred, the victim testified: "It was Taylor, Washtenaw County, Ypsilanti, Ann Arbor, all around. Every year he would move. And he would take me to his home and he would do these things in his home."

The victim was later recalled to testify, clarifying the location of the sexual assaults. She testified that when she was under the age of 13, she performed oral sex on defendant, he performed oral sex on her, he inserted his fingers into her vagina, he touched her anus and breast, and he rubbed his penis in her genital opening all in the city of Inkster, Michigan. She further clarified that during the ages of 13, 14, and 15, defendant would pick her up and move her to different cities, which included Taylor, Michigan, and would perform oral sex on her, force her to perform oral sex on him, insert his fingers into her vagina, place his penis in and around her vagina, and touch her breast and anus.

The prosecution also presented a witness, defendant's first cousin, who testified that defendant began sexually assaulting her when she was approximately 12 years old. This included performing oral sex on her, sodomizing her, and placing his penis inside of her vagina. The witness stated that defendant raped her and she became pregnant when she was 14 years old. A forensic scientist testified that defendant was the father of the witness's child.

Defendant was convicted of six counts of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct. Defendant was sentenced to concurrent sentences of 47 years and 6 months to 85 years for each count. Defendant now appeals on several grounds.

II. COUNT V

A. Standard of Review

"For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Because defendant did not object to the addition of count V to the amended felony information, this issue is not preserved. Unpreserved claims are reviewed for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is warranted only when error occurred, it was plain, and it affected defendant's substantial rights in that it "resulted in the conviction of an actually innocent defendant or . . . seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* at 763-764 (quotation marks and citations omitted).

B. Analysis

Defendant first argues that his conviction for count V, first-degree criminal sexual conduct, should be vacated because he was not bound over for trial on this count. The initial felony information alleged 10 counts of first-degree criminal sexual conduct and two counts of second-degree criminal sexual conduct. At the preliminary examination, however, the prosecution only requested a bind over on four counts of first-degree criminal sexual conduct and

one count of second-degree criminal sexual conduct.[2] The prosecution explained that in regard to count V (finger in anal opening), the victim did not testify to anal penetration and that it could not establish jurisdiction for count VI (penis in genital opening), count VII (finger in genital opening), count VIII (fellatio), count IX (cunnilingus), and count X (finger in anal opening). The magistrate concurred, and found that there was probable cause to bind defendant over for counts I through IV and XI.

Following the preliminary examination, the prosecution filed an amended felony information on September 21, 2011, alleging seven counts of criminal sexual conduct: count I (penis in genital opening under age 13); count II (finger in genital opening under age 13); count III (fellatio under age 13); count IV (cunnilingus under age 13); count V (finger in genital opening age 13, 14, or 15 and related by blood); count VI (finger in anal opening age 13, 14, or 15 and related by blood); and count VII (sexual contact second-degree). Notably, counts V and VI of the amended felony information were not subject to the magistrate's finding of probable cause at the preliminary examination. Yet, consistent with the amended felony information, on the first day of trial on February 6, 2012, the trial court read the counts to the jury, including counts V and VI.

Defendant contends that his conviction for count V must be vacated because the trial court never acquired jurisdiction over the offense, he was never bound over for trial on count V, and the prosecutor did not bring a motion to amend the information to add count V. While it may be true that the prosecution did not bring a formal motion to amend the information to include count V, it also is true that defendant never objected to the fact that he was not bound over on count V. He failed to object when the felony information was amended or when the court read count V to the jury on the first day of trial. He likewise failed to object at the close of trial when the counts were read to the jury, who were then charged with determining defendant's guilt. In fact, he affirmatively stated that he was satisfied with the jury instructions.

Moreover, "[a]n information may be amended at any time before, during, or after trial to cure any defect, imperfection, or omission in form or substance, including a variance between the information and the proofs, as long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime." *People v Higuera*, 244 Mich App 429, 444; 625 NW2d 444 (2001); see also *People v Russell*, 266 Mich App 307, 317; 703 NW2d 107 (2005) ("[a] trial court may amend the information at any time during the trial.") The Michigan Supreme Court also has recognized that "[w]here a preliminary examination is held on the very charge" that was later reinstated at trial, "the defendant is not unfairly surprised or deprived of adequate notice or a sufficient opportunity to defend at trial[.]" *People v Goecke*, 457 Mich 442, 462; 579 NW2d 868 (1998). In the instant case, one of the charges dismissed at the preliminary examination was for first-degree criminal sexual conduct (finger in genital opening when victim was 13, 14, or 15 and related by blood), which became count V at trial. Thus, defendant cannot

[2] The counts were: count I (penis in genital opening); count II (finger in genital opening); count III (fellatio); count IV (cunnilingus); and count XI (sexual contact second-degree).

claim unfair surprise because the preliminary examination was "held on the very charge" that was later reinstated at trial. *Goecke*, 457 Mich at 462.

Furthermore, the evidence produced at trial established defendant's guilt beyond a reasonable doubt for count V. The victim clearly testified that during the ages of 13, 14, and 15, defendant would pick her up and move her to different cities, which included Taylor, Michigan, and insert his fingers into her vagina. Therefore, any error regarding the bind over for count V was "rendered harmless by the presentation at trial of sufficient evidence to convict." *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). We also reject defendant's argument that the trial court lacked jurisdiction to consider count V, because "[o]nce a preliminary examination is held and the defendant is bound over on any charge, the circuit court obtains jurisdiction over the defendant. Jurisdiction having vested in the circuit court, the only legal obstacle to amending the information to reinstitute an erroneously dismissed charge is that amendment would unduly prejudice the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend." *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008) (quotation marks and citation omitted).

III. VICTIM TESTIMONY

A. Standard of Review

Defendant also contends that the trial court abused its discretion when it allowed the prosecution to recall the victim to testify even though she had not been sequestered following her initial testimony. Decisions regarding the sequestration of witnesses are reviewed for an abuse of discretion. *People v Roberts*, 292 Mich App 492, 502-503; 808 NW2d 290 (2011). "A trial court abuses its discretion when it selects an outcome that was not in the range of reasonable and principled outcomes." *Id.* at 503. Further, "[t]he proper interpretation and application of a court rule is a question of law that is reviewed de novo." *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012).

B. Analysis

"The purposes of sequestering a witness are to prevent him from coloring his testimony to conform with the testimony of another, and to aid in detecting testimony that is less than candid." *People v Meconi*, 277 Mich App 651, 654; 746 NW2d 881 (2008) (quotation marks and citations omitted). In regard to the sequestering of victims, MCL 780.761 provides:

> The victim has the right to be present throughout the entire trial of the defendant, unless the victim is going to be called as a witness. If the victim is going to be called as a witness, the court may, for good cause shown, order the victim to be sequestered until the victim first testifies. The victim shall not be sequestered after he or she first testifies.

When interpreting statutory language, we examine "the plain language of the statute; where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *People v Barrera*, 278 Mich App 730, 736; 752 NW2d 485 (2008) (quotation marks and citation omitted).

The trial court's decision to allow the victim to stay in the courtroom was not an abuse of discretion. The plain language of MCL 780.761 clearly provides that the victim "*shall* not be sequestered after he or she first testifies." (Emphasis added). As "shall" denotes mandatory language, *People v Bell*, 276 Mich App 342, 347; 741 NW2d 57 (2007), the trial court properly allowed the victim to stay in the courtroom after she first testified.

Moreover, the primary reason to sequester a witness is to prevent her from conforming her testimony to that of another witness. *Meconi*, 277 Mich App at 654. Defendant contends that hearing counsel's arguments and the testimony of others unfairly colored the victim's testimony because she clarified when she was recalled that the acts occurred in Wayne County, and "a defendant must be tried in the county where the crime is committed." *People v Malone*, 287 Mich App 648, 660; 792 NW2d 7 (2010). However, the version of events the victim testified to during her initial testimony was consistent with the testimony she offered when recalled. Even in her initial testimony, the victim testified: "It was Taylor, Washtenaw County, Ypsilanti, Ann Arbor, all around. Every year he would move. And he would take me to his home and he would do these things in his home." Hence, the jury could have concluded that the sexual acts that occurred when she was 13, 14, and 15 occurred in Taylor, Michigan, in Wayne County. When the victim was recalled to testify, she merely provided further clarification regarding her age and what acts occurred in Taylor. Thus, the trial court did not abuse its discretion when it allowed the victim to remain in the courtroom and for the prosecution to recall her to testify.

IV. COUNT VI

A. Standard of Review

Next, defendant contends that the trial court improperly amended count VI based on testimony from the victim when she was recalled to the stand. "A trial court's decision to grant or deny a motion to amend an information is reviewed for an abuse of discretion." *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). An abuse of discretion occurs when the trial court chooses an outcome outside the range of reasonable and principled outcomes. *Roberts*, 292 Mich App at 503.

B. Analysis

"The court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence." MCL 767.76. Additionally, MCR 6.112(H) provides that "[t]he court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant. On motion, the court must strike unnecessary allegations from the information."

At issue in this case is that the trial court allowed the prosecution to amend the wording of count VI. Although it remained a charge for first-degree criminal sexual conduct, it changed from finger in anal opening to penis in genital opening, conforming to the evidence at trial. Defendant nevertheless contends that the amendment was improper because the prosecution did not establish that this crime occurred in Wayne County. The victim, however, testified during

her initial testimony and more specifically when she was recalled that defendant penetrated the lips of her vagina with his penis when she was 13, 14, and 15, while she was present in Taylor, located in Wayne County. Thus, the evidence established that the acts alleged in count VI occurred in Wayne County and as discussed above, the trial court did not err in allowing the victim to give further testimony when she was recalled.

Moreover, the prosecution's motion to amend the information did not add an additional charge, but merely altered the type of penetration relied on for the first-degree criminal sexual charge. See *Higuera*, 244 Mich App at 444 (while the felony information may be amended, "the amendment [cannot] charge a new crime."). Defendant also has failed to demonstrate that he was unfairly surprised or prejudiced, as the amendment merely conformed to the proofs at trial. The trial court's decision permitting the amendment was not in error.[3]

V. PROSECUTORIAL MISCONDUCT

A. Standard of Review

Defendant also contends that the prosecution committed prosecutorial misconduct when it improperly vouched for the credibility of a witness and the victim, and when it delivered an argumentative opening statement. Defendant, however, failed to object to the prosecution's opening statement and "[w]here a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error." *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

B. Analysis

"Generally, prosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (quotation marks, citation, and brackets omitted). "Prosecutors have discretion on how to argue the facts and reasonable inferences arising therefrom, and are not limited to presenting their arguments in the blandest terms possible." *People v Meissner*, 294 Mich App 438, 456; 812 NW2d 37 (2011). We examine the prosecutor's remarks in context to determine if defendant received a fair trial. *Bahoda*, 448 Mich at 266-267.

While defendant highlights a portion of the prosecution's opening statement that mentions defendant's cousin, he fails to articulate what made the statement improperly argumentative. As this Court has repeatedly recognized, an appellant may not simply "announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d

[3] Also, as discussed in the context of count V, even though defendant was not originally bound over on count VI, the court read count VI during voir dire and during the jury instructions, defendant did not object, and the court properly allowed a subsequent amendment to conform with the proofs.

291 (2001) (citation and block quote omitted). Moreover, we find that nothing in the statement that is argumentative. At no point in the opening statement did the prosecutor vouch for the witness's credibility or allude to his special knowledge about the truthfulness of the witness. See *Meissner*, 294 Mich App at 456 (quotation marks and citation omitted) ("the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness."). Further, even if the prosecution's opening statement was argumentative or it improperly vouched for the credibility of the witness, the trial court's jury instructions cured any prejudice. Specifically, the court instructed the jury that the lawyers' statements were not evidence. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

We also reject defendant's argument that the prosecution improperly vouched for the victim's credibility during its opening statement. Defendant takes issue with the prosecutor's comment referring to the victim as a "very compelling" witness and that "[the victim is] telling the truth and you're going to be able to see that." These statements were proper. Although the prosecution may not vouch for the credibility of a witness, it may comment on whether a witness is worthy of belief. *People v Schultz*, 246 Mich App 695, 712; 635 NW2d 491 (2001); *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Moreover, nothing in this statement implied that it was the prosecutor's personal belief rather than a conclusion from the evidence. Considered in context, the prosecutor's statements were a proper reflection that, based on the evidence, the jury would be able to discern that the victim was telling the truth. Also, any potential prejudice was cured by the trial court's jury instructions that the lawyers' statements were not evidence, as jurors are presumed to follow their instructions. *Abraham*, 256 Mich App at 279.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

Lastly, defendant contends that his trial counsel provided ineffective assistance of counsel. Whether a defendant received effective assistance of counsel is a mixed question of fact and law, as a "trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). When reviewing a claim of ineffective assistance of counsel that has not been preserved for appellate review, a reviewing court is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

B. Analysis

In order to establish a claim for ineffective assistance of counsel, a defendant must first demonstrate that "counsel's representation fell below an objective standard of reasonableness," which requires a showing "that counsel's performance was deficient." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). A defendant must then demonstrate that "the deficient performance prejudiced the defense," which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial . . . ." *Id.* at 687. The Court has

held that this second prong is asking whether "there was a reasonable probability that the outcome of the trial would have been different had defense counsel" adequately performed. *People v Grant*, 470 Mich 477, 496; 684 NW2d 686 (2004).

Defendant's argument that he received ineffective assistance of counsel is meritless. First, defendant contends that he was denied the effective assistance of counsel when his trial counsel failed to object to the court's addition of counts V and VI at trial. Yet, even if defense counsel behaved objective unreasonably in failing to object, defendant has failed to demonstrate that the outcome of the proceedings would have been different. As discussed above, a trial court has discretion to allow the jury to consider counts that a defendant was not bound over for at the preliminary examination. See *Higuera*, 244 Mich App at 444; *Russell*, 266 Mich App at 317; *Goecke*, 457 Mich at 462. Moreover, because there was overwhelming evidence of defendant's guilt for these charges, we cannot say that defendant has demonstrated the result of the proceedings would have been different had defense counsel objected.

Second, defendant contends that trial counsel was ineffective for failing to object to the prosecution's opening statement. However, the prosecution's comments during opening statement were proper. "Because the comments were proper, any objection to the prosecutor's arguments would have been futile. Counsel is not ineffective for failing to make a futile objection." *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). Therefore, we reject defendant's claims of ineffective assistance of counsel and decline to remand for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

VII. SENTENCING

Lastly, defendant contends in his supplemental Standard 4 brief that he is entitled to resentencing because, *inter alia*, the crimes against the victim occurred before 1997. The prosecution concedes that defendant was incorrectly sentenced under the legislative sentencing guidelines, MCL 777.1 *et seq.*, which only apply to crimes committed on or after January 1, 1999, MCL 769.34(2). Accordingly, remand for resentencing and for the correction of the PSIR is warranted. Because defendant is a habitual offender, the judicial sentencing guidelines are inapposite and defendant's sentence must conform to the principle of proportionality. See *People v Gatewood*, 216 Mich App 559, 560; 550 NW2d 265 (1996).

VIII. CONCLUSION

Defendant has failed to establish any error requiring reversal regarding his conviction for count V, the victim being recalled to the stand, or his conviction for count VI. He also has failed to demonstrate any instances of prosecutorial misconduct or that he was denied constitutionally effective counsel. However, defendant is entitled to resentencing because the crimes occurred before the enactment of the legislative sentencing guidelines, MCL 769.34(2). We affirm defendant's convictions but remand for resentencing. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Michael J. Riordan